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No. 188

IN THE

United States Supreme Court

OCTOBER TERM, 1929.

JAMES C. DAVIS, FEDERAL AGENT, ET AL.,
Petitioners,

v.

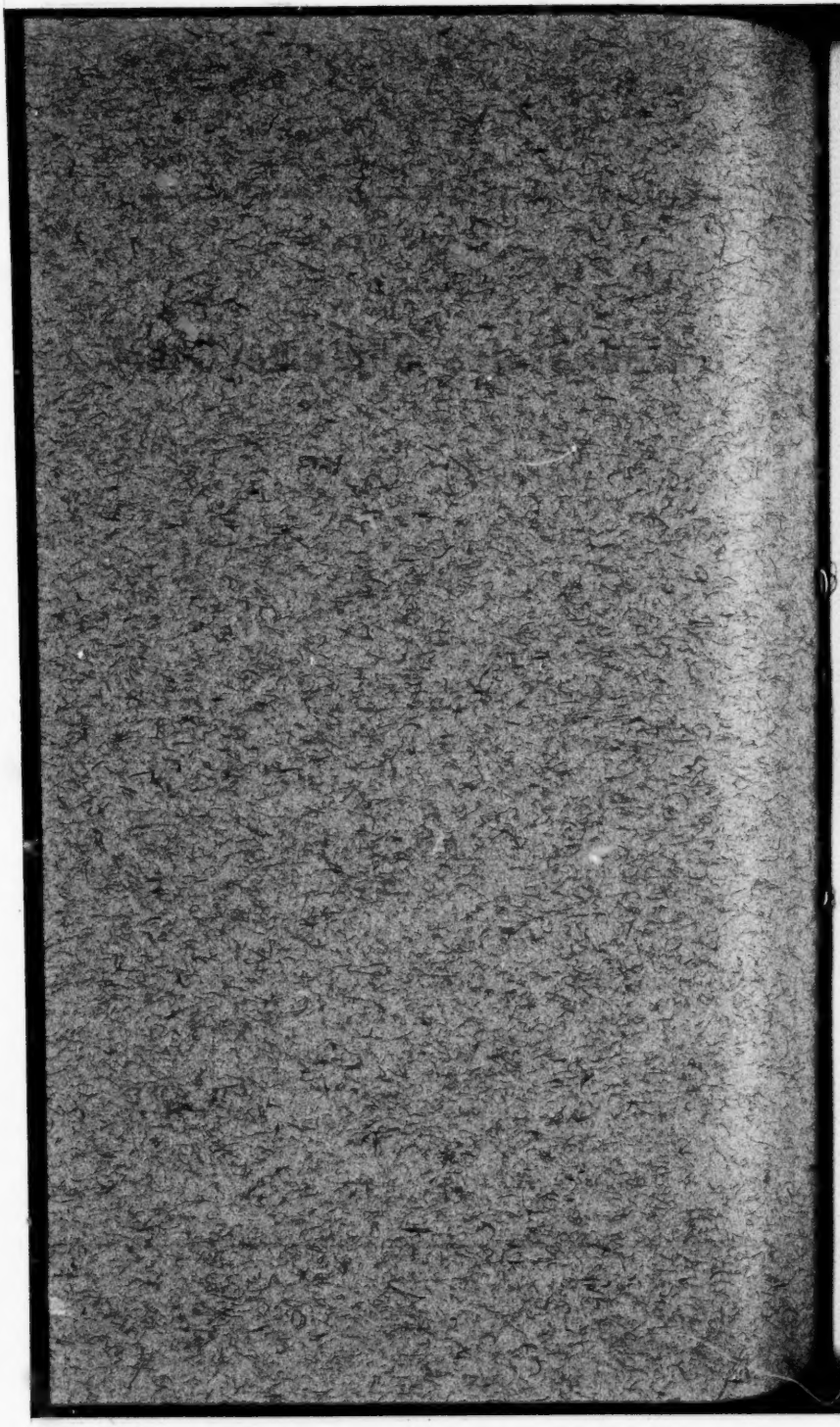
MRS. MARY PRESTON, ADMINISTRATRIX,
Respondent.

BRIEF FOR PETITIONERS

— BY —

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McCURDY-YOUNG CO., HOUSTON



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v.

MRS. MARY PRESTON, ADMINISTRATRIX,
Respondent.

BRIEF FOR PETITIONERS

I.

The Opinion of the Court Below.

The opinion of the Supreme Court of Texas in this cause has not yet been published in the Texas Reports, but it is found in the reporter system in 16 S. W. (2d), 117. It is also found in the record of this cause at pages 130-36, inclusive.

II.

Jurisdiction.

The judgment of the Supreme Court of Texas was entered March 27, 1928, and the order of said court

overruling the motion for rehearing was entered on April 24, 1929. (R. 136.) Under the Constitution and statutes of Texas, the Supreme Court of Texas is the court of last resort in that State, and the overruling of the motion for rehearing terminated the litigation and established a final judgment, from which relief is sought in this honorable court.

The petitioner is the Federal Agent, representing the United States in connection with matters arising out of the Federal administration of railroads. James C. Davis is the designated agent in the litigation as it now appears before this court, because the judgment stands as against him in that capacity, notwithstanding his retirement and the appointment of his successor. He is joined as petitioner by Fidelity & Deposit Company of Maryland, surety on the appeal bond.

Respondent is Mrs. Mary Preston, Administratrix of the estate of her deceased husband, W. P. Preston.

The action as finally carried to judgment was under and pursuant to the provisions of the Federal Employers' Liability Act, approved April 22, 1908 (35 Stat. 65, C. 149; Comp. Sections 8657-8665), to recover damages for the benefit of Mrs. Preston as the surviving widow of the deceased. The employer of W. P. Preston at the time he met his death was the Director General of Railroads, operating the properties of Houston Belt & Terminal Railway Company under the authority of Congress. Preston met his death in a switch yard in Houston, Harris County, Texas, on September 15, 1919, his death having been caused by his being run over and crushed and dragged beneath a certain car or cars engaged in interstate

commerce and being handled by Preston and others of his switching crew in furtherance of such commerce.

Suit was filed on February 26, 1920, against "Walker D. Hines, Director General of Railroads." (R. 2.) The suit remained inactive until May 31, 1922, when Mrs. Preston, suing individually and not as Administratrix, filed and presented a motion for substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General of Railroads. This motion was opposed because of the lapse of time and on two grounds specifically, that the Act of February 8, 1899 (Appendix, p. 27), prevented the substitution after lapse of one year, and that, in any event, this substitution could not, under the circumstances, be accomplished after the lapse of two years subsequent to the termination of Federal control. (R. 8-9.) The motion was, however, granted on May 31, 1922. (R. 10.) The same grounds as were presented in objection to the substitution were again brought to the attention of the court by the defendant, James C. Davis, Federal Agent, through the medium of a plea in abatement, filed November 5, 1922, but this was overruled. (R. 10-11.)

In addition to the foregoing, James C. Davis, answering in the cause, presented a general demurrer and general denial and pleas of limitation arising, not only under the Federal Employers' Liability Act, but also under the Transportation Act of 1920. (R. 15 *et seq.*)

After the parties had rested, plaintiff's attorneys discovered their oversight in not having qualified Mrs. Preston as administratrix and in not having her intervene in that capacity in light of the controlling effect of the Federal Employers' Liability Act. Hence, leave to file a trial amendment was requested and

granted and the complexion of the case was changed to that extent. In answering the trial amendment, the defendant reiterated the previous objections based on the failure to substitute the Federal Agent in time, and also specially excepted to the trial amendment, because it showed upon its face that Mrs. Mary Preston as Administratrix had appeared in the cause suing James C. Davis, Federal Agent, for the first time more than two years after termination of Federal control. (R. 21-2.) Defendant, however, adopted in its answer to the trial amendment the other pleas found in its answer to the amended original petition. (R. 23.)

After the parties had rested and before the cause was submitted to the jury, the defendant requested the trial court to instruct the jury peremptorily in his behalf, but this request was refused. (R. 28.)

The cause was submitted to the jury November 29, 1922, following which a verdict was returned and received, and upon the verdict the court entered a judgment against James C. Davis, Federal Agent, in the sum of $3,750.00, with interest and costs. (R. 34.) The cause was duly appealed to the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston, but by the order of the Supreme Court of Texas, acting under statutory power, the case was transferred to the Ninth Supreme Judicial District of Texas, at Beaumont. It was there heard and the judgment of the District Court was affirmed. (R. 86.) The appellant regularly filed his motion for rehearing, setting up all of the grounds presented herein and others, which motion was overruled by the Court of Civil Appeals on May 5, 1924.

Thereafter, on June 28, 1924, petitioner filed

his petition for a writ of error, requesting the Supreme Court of Texas to review the action of the Court of Civil Appeals, therein setting forth all of the questions now involved in this proceeding. The writ was granted and the cause regularly heard by the Supreme Court of Texas, which handed down its decision on March 27, 1929, also affirming the judgment of the trial court and of the Court of Civil Appeals. (R. 131-136.) Petitioners filed their motion for rehearing with the Supreme Court of Texas April 10, 1929, setting forth all the questions involved herein. Said motion was overruled on April 24, 1929. (R. 136.) The Supreme Court of Texas is the court of last resort in that State and from its final judgment petitioners now seek relief, relying upon the provisions of Section 237, as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 937; U. S. C. A., Title 28, Section 344), for jurisdiction.

Claims Advanced and Rulings Made.

In the State courts petitioners set up and claimed certain rights, privileges and immunities under certain statutes of the United States, which said privileges and immunities are invaded and denied by the adverse judgment of the Supreme Court of Texas herein, to wit:

1. This action being one cognizable under the Federal Employers' Liability Act, approved April 22, 1908 (35 Stat. 65, C. 194, Comp. St. Sec. 8657, 8665), it appears, upon consideration thereof, that the rights and obligations of petitioners depend upon that Act and applicable principles of common law as interpreted by the Federal courts. Just as held in *Chicago, M. & St. P. R'y Co. v. Coogan,* 271 U. S. 472, 46 Sup.

Ct. Rep. 564, petitioners here contend that, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was the cause of the death upon which the action is predicated, and that there was error in not granting the request for a peremptory instruction and error in the appellate courts in upholding the action of the trial court on this point.

2. It is contended by petitioners that this action abated by virtue of the application and effect of the Act of Congress entitled "An Act to Prevent the Abatement of Certain Actions," approved February 8, 1899. (Appendix, p. 27.) It is adversely contended that, even though there was an abatement under the statute mentioned, this is relieved by virtue of the application and effect of the Winslow Bill, which became effective March 3, 1923. (42 Stat. L. 1433.) (Appendix, pp. 28-29.) In reply to this contention petitioners say that the provisions of the Winslow Bill are not available because the action was not "properly commenced" within the prescribed period of limitation, without which the saving effect of this last mentioned statute cannot be invoked.

3. Petitioners further contend that the action is barred by limitation under (a) the two-year period limiting actions that may be brought under the Federal Employers' Liability Act, and (b) the same period limiting actions that may be brought against the Federal Agent under the Transportation Act. (Appendix, pp. 27-28.) It is adversely contended that, since suit was brought against the Director General of Railroads within the limitation period, viewed from the standpoint of each statute, there could be no bar by prescription. But petitioners present that this cause undoubtedly

did abate and that when it abated, limitations became effective and the right of action was destroyed before ever the Winslow Bill became law.

The bearing of these questions on the cause is apparent from the brief narrative of the course of the litigation already presented. It appears that the Texas courts have held the evidence to have been sufficient to take to the jury the issue of proximate cause and to justify an adverse finding on that issue. The specific ruling complained of is the refusal of the request for a peremptory instruction. In like fashion, it appears that the Texas courts overruled the contentions as to the abatement of this cause, giving effect to the Winslow Act, notwithstanding the contention of petitioners that the action had not been "properly commenced" within the period of limitation prescribed. It further appears that the Texas courts overruled the contention as to limitations, thereby disregarding the accomplishment of the abatement under the Act of February 8, 1899, which opened up the cause of action for the effect of limitations thereon.

Concise Statement of the Case.

As already indicated, this suit was filed on February 26, 1920, against Walker D. Hines, Director General of Railroads. (R. 2.) On May 31, 1922, a motion was presented for substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General. The motion was opposed, but it was granted on the day it was presented. (R. 10.) During the course of the trial, Mrs. Preston qualified as Administratrix for the first time and intervened, asking leave to continue the suit in that capacity, which leave was granted over the objections of the defendant. (R. 20.) Upon the ver-

dict, which was returned on November 29, 1922, the court entered judgment against James C. Davis, Federal Agent, in the amount of $3,750.00, with interest and costs. (R. 34.)

As to the Issue of Proximate Cause.

The essence of the allegations of negligence proximately causing the death of the decedent is that he had been furnished an unsafe place to work, particularly due to the presence of a steel rail alongside the track, against which he is alleged to have tripped or stumbled as he tried to alight from a string of moving cars, thus being caused to go under said cars and meet his death. (R. 12 and 20.)

The record shows that the Federal Agent, by his attorneys, requested the court to give a peremptory instruction in his behalf, which was refused. (R. 28.)

The seventh assignment of error as presented in the brief on appeal in the Court of Civil Appeals, and carried forward into the proceedings on writ of error before the Supreme Court of Texas, reads as follows:

> "The trial court erred, to the prejudice of appellant, in refusing the request of James C. Davis, Federal Agent, for a peremptory instruction, because it wholly failed to appear from any evidence that the death of plaintiff's husband was proximately caused by any negligence of the Director General of Railroads, or any of his agents, servants or employes."

This assignment is found in the Record at page 37. In the petition for writ of error before the Supreme Court of Texas this same matter is found presented on pages 97-98 and on pages 102-119 of the Record.

To draw the attention of the court as directly as

possible to the issue as to the sufficiency of the proof, we first call attention to the statement found in the opinion of the Supreme Court of Texas on this subject. We quote from the opinion as appearing in the Record, at page 134, as follows:

> "The evidence plainly supported the finding that the Director General by his agents was negligent in leaving a ninety-pound iron rail about a foot and a quarter from the coach steps where it was apt to be encountered by a switchman in alighting from the train and walking beside the track in the performance of his regular duties. With evidence disclosing the point at which Preston stepped from the coach by the imprint of his heel on the ground about two and a half feet from the end of the rail, with his duties requiring his next step to be made about where he would be tripped by the end of the rail, especially while combating a thirty-five miles an hour wind, and with his cap and lantern found about where they would have fallen upon his being tripped by the rail, and with his body actually caught and mangled beneath the cars as they proceeded a short distance farther; there being no evidence of anything save the rail to reasonably account for Preston's fall beneath the train; we would not be justified in holding as a matter of law that a recovery should be denied his administratrix on the issue of proximate cause." (R. 134.)

Since we attack the inference that there was evidence "disclosing the point at which Preston stepped from the coach by the imprint of his heel on the ground, etc.," it is necessary to consult the Record to see what are the real facts.

The witnesses are: M. A. Moore, engine foreman of the crew in which Preston worked, whose testimony appears in the Record at pages 40-50 and 60-71; J. S. Cloud, a switchman in the same crew, whose testi-

mony appears in the Record at pages 50-55; A. H. McDaniel, also a switchman in the same crew, whose testimony appears in the Record at pages 55-58 and on page 71; J. B. Quarles, a car inspector, whose testimony appears in the Record at page 74; T. C. Morris, a crossing flagman, whose testimony appears in the record at pages 76-80; and D. E. Proper, a civil engineer, whose testimony appears in the Record at page 80.

All of the witnesses mentioned except the one last named were on duty and in the vicinity at the time of Preston's death. On the night of this tragedy it was raining and the wind was blowing a gale. (R. 41 and 63.) Because it seemed a storm was brewing, Santa Fe passenger train No. 5, south bound from Chicago, Illinois, to Galveston, Texas, was ordered held at Houston over night. The passengers were disembarked and the empty train carried to a storage track for the night. (R. 60.) Preston was a member of the switching crew that handled this empty equipment to the point of storage, but was killed under the wheels of the train before the task was completed. He was last seen walking toward the head end of one of the coaches in which he, with some other members of the crew, was riding. (R. 61.) No one saw him fall and there was no eyewitness to his death.

Preston was found dead near Milby Street, Houston, Texas, approximately two blocks beyond McKinney Avenue, in the direction of the train's outbound movement. (R. 61-62.)

There being no eyewitnesses to his death and it being essential from the standpoint of respondent to rely on an indentation in the shell ballast near the steel rail in question, as indicating that Preston met

his death by stumbling against said rail, we direct our attention specially to this one feature of the case, because it is at this point we think the case fails in respect to proximate cause. Had it not been for the utter weakness of the case at this point, it is doubtless true that the government would not have cared to raise the point for review here.

There was some doubt as to whether it was a heel print. J. S. Cloud, a member of the crew, said:

> "I was with the rest of them when they went there and examined for any signs at the McKinney Street crossing; we all walked there to see which side he got off and looked at the foot print; I could not swear to it from what I saw but my opinion—what I mean is nobody could, at least I could not, swear to what side he got off. We found what looked like a foot print in the shell there but of course it was raining pretty hard and we could not tell whether it was an old or new foot print. Seems like it was a heel print as near as I could discern. I would not venture to say how far that was from the end of the loose rails between the two main line tracks, but it seems about a step or a step and a half, possibly two; I don't know exactly what distance it was." (R. 53.)

A. H. McDaniel testified:

> "My attention was called to a mark in the shell to the left of the outbound main line in the discussion there about the death of Preston; I looked at the particular mark that was under discussion. I could not swear it was a heel print, I could not tell whether it was a heel print. If it was a heel print it was close enough to McKinney Avenue that it could have been made by any member of the crew or any passerby, I suppose." (R. 72-73.)

J. B. Quarles testified:

> "My attention was called to a mark in the shell

near the McKinney crossing, and also between the two main lines. That mark looked something like the print of a man's heel, but I could not say that it was, it was not a perfect print of a heel but it looked something like a heel, but I could not state for certain whether it was; I would not undertake to swear it was a heel. I judge it was something like six or eight feet from the board walk across McKinney." (R. 75.)

The crossing flagman, T. C. Morris, testified:

"My attention was called to a mark in the shell in the course of the discussion about Preston's death, between the two mainline tracks. I could not tell definitely how long it had been made, I could tell nothing more than you could see a heel mark there and it looked to be fresh and we supposed it to be the heel mark where he lit; that was the supposition. * * * I surely could not tell from looking at that heel mark who made it." (R. 78.)

Aside from any doubt whether or not this was a heel mark, it is clear enough that the mark might have been made by some other member of this crew or some other railroad employe, or by some member of the public. In the first place, it was admittedly near McKinney Avenue, a thoroughfare in the City of Houston. The engine foreman, M. A. Moore, said:

"It has been quite a while, I had been down there but I don't remember whether it was twice I had been down there with the crew comparatively a short while before this; some of our men got off before that and one of them could have made this heel print getting off on that occasion if he had stepped off on that place. They would get off ordinarily at McKinney Street crossing; this was right at where the watchman walked back and forth; they may step off on the crossing—walk across there—they have got coach repairers,

you know, that go over there, no, they didn't get off of no engine over there and walk over there, they have a track walker that walks the track. No, I am not trying to tell the jury that this was Preston's heel mark, I could not swear it was Preston's heel mark. I don't know how he got caught and carried on that train down to Milby Street." (R. 65.)

In another connection this man said:

"I have seen them get off there frequently and I have got off there myself; it was a frequent thing for a man to get off at this particular place, everybody gets off there that generally works long field; * * * " (R. 47.)

The witness A. H. McDaniel states that this mark could have been made by any member of the crew or by any passerby, and that he himself had been switching out there that afternoon a short while before this particular trip. (R. 73.)

The witness J. B. Quarles says:

"I do not remember who first called my attention to that particular mark that looked like a heel mark. I suppose there had been lots of people walking around there all day and a good many that evening." (R. 76.)

It is important to note that there is no evidence to controvert the contention of petitioners that this supposed heel mark could have been made by some one else than Preston. But there are other considerations, circumstantial in character, that should be noted in this connection.

Preston was found dead approximately two blocks away from this heel mark and the rail which, it is contended, caused his death. (R. 62.) It is also notable that he was found not on the left side of the

track on which the train was moving, but on the right side thereof. (R. 62.)

Indications that he had been dragged were found on the outbound main track. Moore states that he found pieces of his underclothes and jumper about a quarter of a block beyond McKinney. On further reflection, he seemed to think it was about one hundred and fifty feet beyond McKinney where he saw the first signs that Preston had been caught. He says he saw little pieces of his undershirt and jumper but he saw no blood. (R. 47.) He did not personally pick up the hat or the lantern. Beyond the point where he found pieces of jumper and undershirt in the direction of Milby where the body was found, he found nothing except pieces of shirt, but there were no other signs in the vicinity of where the body was found at Milby Street crossing. (R. 48.)

With further reference to where he found this jumper, etc., he states it was over toward the right side of the train going out. Bearing in mind that this train was moving on the outbound main line and had already crossed McKinney Avenue, and that the body was found at Milby Street crossing, it is important to note Moore's statement as follows:

> "His body was picked up from the right side of the track, I mean inside of the track, close to the right rail; say here is the track, here is where his body was found (indicating); it was in between the rails, over towards the right. I don't know how he was drug under; he simply must have been drug. I only saw him get out of the coach; some used one side to get off and some another, you can't say which side he got off; a left-handed man would go to the left, a right-handed man would go to the right." (R. 49.)

As bearing on whether or not Preston would have attempted to alight in the vicinity of where the supposed heel print was found, it is suggested as important to consider what the crew had to do to complete the immediate job in hand. Moore testifies the purpose was to carry this passenger train equipment beyond the crossover switch in the vicinity of Milby Street and then to back it up on the "rip track" for storage. There was a car situated on this rip track thirty feet from McKinney Avenue, that is to say thirty feet beyond the street line of McKinney on the outbound movement of the train. This car was eighty feet long. It was necessary to couple into this car and by calculation, it is seen that the distance from McKinney Avenue where the coupling had to be made was one hundred and ten feet. It was Preston's duty to make this coupling because he was long field man. It was shell ballast in the vicinity of where the coupling had to be made, just as at the point where the supposed heel print was found. Preston knew he had to make this coupling. When the coupling was made, it was necessary to shove the standing car beyond McKinney and then pull up to leave the passenger equipment on the rip track on the south side of McKinney. All these matters are reflected in Moore's testimony. (R. 64-65.)

Alternative to the theory that Preston stumbled against this steel rail and was thereby caused to fall under the train, we can suggest a variety of possibilities equally as plausible and supported with equal force in the evidence. It is really impossbile to judge what happened to this unfortunate man. Moore said:

> "At the immediate time Preston was killed it was drizzling I think, wind and rain mixed up.

The wind was blowing I guess about 35 miles an hour. Preston had a raincoat on, it was a long rain coat, I don't know what brand it was. It struck down below the knees, between the knees and ankles." (R. 41.)

In another connection, Moore says:

"As to whether I think that is the reason that Preston met his death in stepping off, will say I could not think nothing because I have two ways to think. I could not answer whether I think the most probable explanation of his death is that he stepped off, hit the rail, it tripped him and threw him under the train. He never worked all day long with a raincoat on, he had on a raincoat that trip. He could have stepped off and hit the rail and tripped; he could have got his raincoat caught in the door, got his clothes caught, or anything like that; I did not know how it was." (R. 49.)

The witness Cloud says:

"He had on a slicker, that was torn all to pieces. I could not tell whether it was torn any one place more than another. His clothing was all torn off of him." (R. 54.)

Another possibility was suggested by Moore. He said:

"Such a man could, if he is standing on the steps and a very severe wind is blowing, a gale, he might somehow be caused to slip or fall and become entangled so as to be dragged under there; he could catch on; you know in all vestibuled cars they have got a little trap door; of course that trap door could fall, you see, and could catch a rain coat or catch on anything, you know, and cause it; you see the wind blowing, it might have blowed him; I wasn't there to see how it happened. The trap door could blow and catch his raincoat and then he would drag underneath." (R. 70.)

The crossing watchman said:

> "That was the night of the storm, the wind was blowing; I declare I could not tell you how strong the wind was, but it was blowing mighty hard. I had reason to notice the violence of the wind. When those coaches usually go by me it didn't seem like there was much wind, but when the train passed me and the wind came against me I had to jump around to keep from going over. When the train was going by me it was a protection to me from the wind, and when the train cleared I felt the wind especially strong. I had a slicker on myself and I had to jump around to keep from falling over." (R. 78.)

Much is made of the finding of the hat and lantern, it being claimed that these two articles were found in such position as to strongly suggest that they had been dropped by Preston as he stumbled against the steel rail in question. There is some confusion as to where these articles were found, as will be seen from the following brief references to the Record.

Moore states that an employe, whom he called a "car knocker," picked up Preston's hat. In this connection, Moore says:

> "When he came to me he was coming towards the east. He had picked the hat up on the main line, he said, on the outbound one. He did not say how far from McKinney Street crossing he picked the hat up." (R. 46.)

He further stated as follows:

> "I do not know of my own knowledge where the lantern or hat was found. The hat was presented to me by a car repairer, I don't remember who it was, I just took it, he says to me, 'Ain't this one of the switchmen's hats?' I says, 'Yes, it is Preston's' and with that—I never even noticed who it was—I ran over to the coach yard." (R. 64.)

Quarles said he rode on this train from the station going to his work in the vicinity of McKinney Avenue. He said the train pulled down and then backed up, leaving a clearance of about thirty feet from McKinney Avenue after he got off. He further says:

> "I was riding on the rear car, I got off of the rear end; I walked towards McKinney Avenue, right towards the watchman's shanty; it was in going there I picked up this man's hat; the best I can recall it was between the inbound main. I was present when his lantern was picked up. The best I can recall, that was between the inbound main and the long rip, we call it there, the next track over." (R. 75.)

Morris, the crossing watchman, says:

> "I don't remember the young fellow's name that first advised me of this man's death, he found the hat in the first place, he fetched the hat around and said one of the switchmen has lost their hat, and I says, 'Let me have it and when they come around I will give it to him and he can get it back again,' so he had to come around on the west side of the main line on the rip tracks there and he forgot something on the east rip track and went back for it, so he asked me for the hat and took it back to Mr. McDaniels I think it was, gave him the hat, and they got to looking around and found the lantern. I saw this young fellow pick up the hat, it was off east of the main line and I think between the long rip track and the short; I was speaking of the hat; it was not between the main line and the rip, it was just over the first rip track." (R. 77.)

As to the Issue of Abatement.

As already indicated, this suit was filed on February 26, 1920, against Walker D. Hines, Director General of Railroads. (R. 2.) Substitution was not attempted

until May 31, 1922, when Mrs. Preston, suing individually and not as administratrix, moved for substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General of Railroads. This was over the objections and exceptions of the defendant, as already indicated. The point was presented by plea in abatement and also by demurrer. (R. 10-11, 15 *et seq.*) Upon the trial, after the parties had rested, the court granted leave for Mrs. Preston to intervene as administratrix and prosecute the action as such. This occurred in November of 1922.

It is judicially known that Federal control of railroads terminated March 1, 1920. Walker D. Hines, Director General, was succeeded by John Barton Payne, who was, in turn succeeded by James C. Davis as Federal Agent, on March 26, 1921. The order of substitution occurred on May 31, 1922, or more than one year after James C. Davis qualified and more than two years after the termination of Federal control.

As to Limitations.

Preston met his death on September 15, 1919. Suit was filed on February 26, 1920. Substitution of the Federal Agent for the Director General was accomplished May 31, 1922. Mrs. Preston qualified as administratrix and intervened in the cause as such on November 29, 1922. Preston and the other members of his crew were engaged in furtherance of interstate commerce at the time he met his death.

SPECIFICATION OF ERRORS

Petitioner presents for consideration and review by this court the following errors which have

been carried through the Record in this cause, from its inception, in varying forms, and which are set forth in the petition for certiorari:

First Assignment.

It was error for the Supreme Court of Texas to uphold the action of the Court of Civil Appeals and of the trial court in respect to the request of the defendant below for a peremptory instruction, because, upon an examination of all the material evidence bearing upon the question, it appears as a matter of law that there was not sufficient evidence to support the inference that any negligence of the Director General of Railroads, or his agents, proximately caused the death of the decedent, W. P. Preston.

Second Assignment.

The Supreme Court of Texas erred to the prejudice of petitioner in holding that this asserted cause of action had not effectively abated under and by virtue of the provisions of an Act entitled "An Act to Prevent the Abatement of Certain Actions," Approved February 8, 1899, C. 121, U. S. Complied Statutes of 1916, Section 1594. (Appendix, p. 27.)

Third Assignment.

The Supreme Court of Texas erred to the prejudice of petitioner in its holding that the asserted cause of action is not barred by limitations under the prescribed period of two years in the Federal Employers' Liability Act and under the prescribed period in the Transportation Act of 1920. (Appendix, pp. 27-28.)

ARGUMENT

As to the Issue of Proximate Cause.

The pertinent evidence has been set forth in our statement of the case. It is believed that, in a controversy as to the sufficiency of evidence to take to a jury an issue of proximate cause, precedent is of comparatively little value, since the proper conclusion can only be reached by considering and valuing the evidence in each particular case.

We have felt that it was quite extraordinary we could find such a close case on the facts as that of *Chicago, M. & St. P. R'y Co. v. Coogan,* 271 U. S. 472, 46 Sup. Ct. Rep. 564, to support our position on this point. Coogan met his death underneath a train just as did Preston. Alongside the track was a pipe and its presence was asserted as negligence proximately causing Coogan's death. The inference that his death was caused on account of the pipe was urged because of a mark found on Coogan's shoe, which seemed to be regarded by counsel presenting the contention, as circumstantially sufficient to take to the jury the issue that Coogan had stumbled against the pipe and thence under the train. Analysis by this court resulted in the rejection of the contentions, and it was held that the railway company could not be required to pay damages on account of the death of Coogan.

It cannot be doubted that, without the indentation in the shell ballast, about which there is much testimony in this cause, there would not even be a pretense that the evidence is sufficient to take to the jury an issue that Preston's death was caused by the steel rail in question. Since we have shown from the evidence that the witnesses on the ground were themselves some-

what doubtful whether or not this was a heel print, and furthermore that, if a heel print, it could have been made by some one else than Preston, we are at a loss to understand how it can be argued in this cause that this indentation in the shell ballast supports the necessary inference. It certainly appears to be as devoid of probative force, as was the evidence in the Coogan case, *supra.*

This court, in a recent decision, makes it clear that evidence which merely suggests the possibility of an occurrence is not sufficient to take to the jury a fact issue on the subject. We refer to *General Insurance Company of America v. Northern Pac. R'y Co.,* 50 Sup. Ct. Rep. 44, 74 L. Ed. (Adv. Sheet No. 3), 97, in which it was sought, circumstantially, to prove that the railway company had set fire to a warehouse. The facts available, briefly, were that the warehouse was nearby the track and that a train had passed a short while before, emitting considerable smoke but there was no evidence of sparks. The possibility of the warehouse catching fire from other sources was open and it was just as plausible an inference that the fire could have occurred from other sources as from the locomotive. Accordingly, the insurance company was non-suited.

The case of *Myers v. Pittsburgh Coal Company,* 233 U. S. 193, cited by the Supreme Court of Texas, does not, we believe, support the position taken in respect to the evidence in this case. In the Myers case, one of the grounds of recovery was negligence on account of the coal company having failed to have an adequate lighting system. As a result, Myers was run over because the motorman could not see him after he had fallen. He was caused to fall by contact with a high powered wire which was a fact reasonably deducible

from the circumstances, there being no alternative inferences reasonably open. His contact with the high powered wire may also have been affected by poor lights.

As to the Issue of Abatement.

It has already been indicated that this suit was originally filed against the Director General on February 26, 1920, and that no effort at substitution was made until May 31, 1922. The Act of February 8, 1899, is copied in the appendix. (Appendix, p. 27.) This was a statute designed to prevent the abatement of certain actions. This statute has been held applicable by this court to actions by or against the Federal Agent appointed by the President to wind up the affairs of the United States Railroad Administration. In the case of *John Barton Payne, Director General, v. Industrial Board of Illinois,* 258 U. S. 613, 42 Sup. Ct. 462, certiorari brought by the Federal administration was dismissed for want of jurisdiction in a *per curiam* opinion, citing this statute and the case of *LeCrone v. McAdoo,* 253 U. S. 217-219. The applicability of this statute was recognized by Congress in passing the Winslow Act, amending the Transportation Act of 1920, which amendment became effective March 3, 1923. The Winslow Act is copied in the appendix. (Appendix, pp. 28-29.)

The first Federal Agent was appointed on March 11, 1920, Walker D. Hines being the appointee. He retired from this office and on May 14, 1920, the President designated John Barton Payne as the successor Federal Agent. He in turn retired and on March 26, 1921, the President designated James C. Davis as Federal Agent. Thus more than one year elapsed after the retirement of Walker D. Hines and

of John Barton Payne, who in turn held the position of Federal Agent, and yet there was no substitution. Furthermore, there was no substitution of James C. Davis until more than one year after his appointment and assumption of the duties of his office.

Under these circumstances, it is the contention of petitioner that this action abated. Certainly this is true unless the Act of March 3, 1923 (the Winslow Act), can be invoked to relieve the situation. But does this Act reach the situation? Petitioner contends that the action was not properly commenced because, under the terms and provisions of the Federal Employers' Liability Act, Mrs. Preston was required to bring her action as Administratrix, because her deceased husband met his death while engaged as an employe in furtherance of interstate commerce. No suit was brought by Administratrix until November of 1922. This was long after the lapse of two years prescribed in the Federal Employers' Liability Act and in the Transportation Act of 1920, and it is one of the provisions of the Winslow Act that it would apply only to actions "properly commenced" within the period of limitation.

It is said that the principle found in *M. K & T. R'y v. Wulf,* 226 U. S. 576, would be applicable. This holds that suit brought under the Federal Employers' Liability Act by the individual survivor can later be amended to sue by Administratrix, and that the original action would be sufficient to stop the running of the statute. It is also contended that it is the complete test of whether or not the action was "properly commenced" within the meaning of the Winslow Act, if it be determined whether or not it was brought in such form as to stop limitations. Petitioner

contends that such was not the purpose of Congress in requiring that the action be properly commenced, and that the requisites are not met unless the action shall have been brought in such form that all outstanding liabilities would be taken care of should judgment be entered upon the pleadings. This evidently was in mind when it was provided that substitution might be accomplished at any time prior to satisfaction of the judgment.

It does not appear that this court has passed upon exactly this point, that is to say, whether or not suit by an individual is sufficient within the meaning of this statute, when the suit properly should have been brought by Administratrix.

As to the Two-Year Period of Limitations.

Under the decision of this court in *William Danzer & Co., Inc., v. Gulf & S. I. R. Co.,* 268 U. S. 633, 45 Sup. Ct. Rep. 612, it cannot be doubted that the two-year period of prescription set forth in the Federal Employers' Liability Act and in the Transportation Act of 1920 reaches the right of action as well as the remedy. In that case this court construed Section 206 (f) of the Transportation Act, which provided that the period of Federal control should not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control. But it so happened that under the applicable statute of the State of Mississippi, and prior to the passage of the Transportation Act, the cause of action asserted by William Danzer & Company was barred if the period of Federal control should be in-

cluded in the period of prescription. An effort was made to invoke the provisions of 206 (f) of the statute, and this court held that such provisions could not be given retroactive effect upon a right of action already barred. In like fashion, petitioner presents that the Winslow Act cannot be given retroactive effect upon a cause of action already barred. Due to the abatement, which undoubtedly was accomplished under the statute of February 8, 1899, limitations reached this cause of action. When the Winslow Act was passed, therefore, the entire right of action had already passed out of existence.

Wherefore, because there was no sufficient evidence to take the cause of action asserted to the jury, because the cause abated and was not revived, and because following abatement the bar of the statutes of limitation prescribed the right as well as the remedy the several courts of Texas have erred to the prejudice of petitioner and relief is asked at the hands of this court

Respectfully submitted,

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APPENDIX

An Act Entitled "An Act to Prevent the Abatement of Certain Actions," Approved February 8, 1899, *C.* 121, 30 *Stat.* 822, *U. S. Compiled Statutes of* 1916, *Section* 1594.

No suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs. (See brief, pp. 3, 6, 20, 23.)

Paragraph (a), Section 206, *Transportation Act of* 1920, *as Amended February* 24, 1922, *March* 3, 1923, *and March* 4, 1927, *U. S. Code, Title* 49, *Section* 74, 41 *Stat.* 461.

Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916), of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent

shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier; except that actions to enforce awards made by the Commission under the provisions of subdivision (c) against the agent so designated by the President may be brought within one year after the date of the Commission's award. (See brief, pp. 6, 20.)

The Winslow Act, Paragraphs (h) and (i) Section 206, *Transportation Act of* 1920, 42 *Stat. L.* 1443, *U. S. Code, Title* 49, *Section* 47.

Actions, suits, proceedings, and reparation claims of the character described in subdivision (a), (c), or (d), properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (a), but may (despite the provisions of the Act entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award, the agent designated by the President then in office. Nor shall any action, suit, or other proceeding heretofore or hereafter brought by any public officer or official, in his official capacity, to enforce or

compel the performance of an obligation due or accruing to the United States arising out of Federal control, abate by reason of the death, resignation, retirement, or removal from office of such officer or official, but such action, suit, or other proceeding may (despite the provisions of such Act of February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of any such final judgment, decree, or award the successor in office.

Orders providing for a substitution in such cases made before this subdivision takes effect by courts having jurisdiction of the parties and subject matter are hereby validated, anything in such Act of February 8, 1899, to the contrary notwithstanding. Actions, suits, reparation claims, or other proceedings of the character described in subdivision (h) which have been abated or dismissed solely because of the provisions of such Act of February 8, 1899, shall be reinstated upon reasonable notice to the adverse party, from the time this subdivision takes effect. (See brief, pp. 6, 23.)